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In the Court of Criminal Appeals of Texas

JOHNNY JOE AVALOS,
Appellant
v.
THE STATE OF TEXAS,
Appellee

State's Reply Brief on the Merits
from the
Fourth Court of Appeals, San Antonio, Texas
Nos. 04-19-00192-CR & 04-19-00193-CR
Appeal from Bexar County

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IDENTITY OF TRIAL JUDGE, PARTIES, AND COUNSEL

The trial judge below was the Honorable **Lori Valenzuela**, Presiding Judge of the 437th Judicial District Court, Bexar County, Texas.

The parties to this case are as follows:

1) **Johnny Joe Avalos** was the defendant in the trial court and appellant in the court of appeals.

2) **The State of Texas**, by and through the Bexar County District Attorney's Office, prosecuted the charges in the trial court, was appellee in the Court of Appeals, and is the petitioner to this Honorable Court.

The trial attorneys were as follows:

1) Johnny Joe Avalos was represented by **Jorge Aristotelidis**, 310 S. Saint Mary's Street, Ste. 1910, San Antonio, Texas 78205.

2) The State of Texas was represented by **Joe D. Gonzales**, District Attorney, and **David Lunan**, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva Street, San Antonio, TX 78205.

The appellate attorneys are as follows:

1) Johnny Joe Avalos is represented by **Jorge Aristotelidis**, 310 S. Saint Mary's Street, Ste. 1910, San Antonio, Texas 78205.

2) The State of Texas is represented by **Joe D. Gonzales**, District Attorney, and **Andrew N. Warthen**, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva Street, Seventh Floor, San Antonio, Texas 78205.

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STATEMENT OF THE CASE

The State incorporates the Statement of the Case from its original brief.

ISSUES PRESENTED

1. Are mandatory life-without-parole sentences cruel and unusual as applied to intellectually disabled offenders?

    A. The Supreme Court has held that mandatory life without parole is not cruel and unusual, and, since then, it has only exempted juveniles from that general holding. Appellant is an adult, not a juvenile. Thus, did the court of appeals err when it disregarded binding precedent?

    B. The Supreme Court's exemption of juveniles from mandatory life without parole was based on several material differences between juveniles and adults. Having an intellectual disability has no bearing on those differences. Thus, did the court of appeals erroneously analogize intellectually disabled adults to juveniles?

    C. Do other considerations—e.g., no evidence of a national consensus supporting appellant's position—also warrant reversal?

2. If the opinion below is affirmed, what are the available punishment options?

STATEMENT OF FACTS

The State incorporates the Statement of Facts from its original brief.

ARGUMENT

The State reiterates the arguments from its original brief. This reply is to supplement that brief in order to address several of appellant's contentions in his response.

I. The relevant portion of *Harmelin v. Michigan* is binding authority.

Appellant, as he did below, argues that *Harmelin v. Michigan*[1] is a "highly fractured holding." (Appellant's Resp. at 18.) But that is misleading.

As explained in the State's original brief, Ronald Harmelin made two distinct attacks on his sentence. First, that his life-without-parole sentence was cruel and unusual because it was "significantly disproportionate" to the crime he committed. *Harmelin*, 501 U.S. at 961. His proportionality argument was rejected by the Court, but its reasoning was fractured. *Compare id*. at 962-94 (opinion of Scalia, J.) *with id*. at 996-1005 (opinion of Kennedy, J.).

But he also argued that imposing life without parole absent an individualized sentencing hearing was cruel and unusual. *Id*. at 961-62. In other words, his second argument attacked the automatic imposition of life without parole. In Part IV of Justice Scalia's opinion, the Court rejected that argument. And, as the opinion header made clear, "Justice SCALIA announced the judgment of the Court *and delivered the opinion of the Court with respect to Part IV*, and an opinion with

[1] *Harmelin v. Michigan*, 501 U.S. 957 (1991).

respect to Parts I, II, and III, in which THE CHIEF JUSTICE joins." *Id*. at 961 (emphasis added). Justice Kennedy, whose opinion was joined by Justices O'Connor and Souter, opened his concurrence by stating, "I concur in Part IV of the Court's opinion and in the judgment." *Id*. at 996 (Kennedy, J., concurring). Accordingly, a clear majority of the Supreme Court—Chief Justice Rehnquist and Justices Scalia, Kennedy, O'Connor, and Souter, i.e., 5 out of 9—joined Part IV and rejected Harmelin's second argument. Therefore, Part IV of *Harmelin* was not "highly fractured" and constitutes binding authority.

Appellant—and the original panel opinion that he cites to—is simply incorrect on that score. Neither the en banc court of appeals nor the *Miller*[2] opinion that it heavily relied upon even attempted to claim *Harmelin* was not binding because it lacked a majority. Instead, they both factually distinguished *Harmelin*. As outlined in the State's original brief, the en banc court was wrong to do so. But that does not change the fact that it rejected *Harmelin* on the ground that it was factually distinguishable, not because it was not otherwise binding.

And its binding status is important because, as appellant himself has made clear, he "does not seek to categorically bar the imposition of a life without parole sentence," but rather he desires "a process that considers mitigating and other evidence before a life without parole sentence can be imposed . . . ." (Appellant's

[2] *Miller v. Alabama*, 567 U.S. 460 (2012).

Resp. at 28.) That relief mirrors the relief sought by Harmelin's second issue, namely, that life without parole was cruel and unusual "because the sentencing judge was statutorily required to impose it, without taking into account the particularized circumstances of the crime and of the criminal." *Harmelin*, 501 U.S. 961-62. That argument was rejected by a majority of the Supreme Court, and that holding has only been deviated from in the case of juveniles, making Part IV of *Harmelin* binding when that issue is raised by any adult, including those with intellectual disabilities.

Appellant also claims that *Modarresi v. State*[3] wrongly concluded that automatic life without parole is constitutional without exception for adult offenders because it "is at odds with *Atkins*'s later treatment of the issue." (Appellant's Resp. at 19 n.3.) Not so.

As explained in the State's original brief, *Atkins*[4] had nothing to do with life-without-parole sentences, but rather the death penalty. But more to the point, *Atkins* rested upon the theory that executing the intellectually disabled is cruel and unusual because such a punishment is disproportional to such offenders' culpability. That theory is in line with Harmelin's *first* argument, namely, that his life-without-parole sentence was cruel and unusual because it was "significantly

[3] *Modarresi v. State*, 488 S.W.3d 455 (Tex. App.—Houston [14th Dist.] Houston 2016, no pet.).

[4] *Atkins v. Virginia*, 536 U.S. 304 (2002).

disproportionate" to the crime he committed. *Harmelin*, 501, U.S. at 961. But appellant has disavowed a proportionality argument, and instead opted for procedural argument in line with the one rejected by the *Harmelin* majority.

Because the proportionality analysis of *Harmelin* failed to garner a majority of the Court, that case would not be binding if appellant were seeking to categorically bar life without parole for intellectually disabled offenders. But he is not. Instead, he is attempting to make an end run around *Harmelin*'s binding procedural holding by distinguishing intellectually disabled offenders from other adults. But, as explained in the State's original brief, that is not how precedent works. Until the Supreme Court again deviates from *Harmelin*, as it did in *Miller*, its majority holding is binding on all other courts.

II. Appellant, not the State, misconstrues *Miller*.

Appellant states that by "[a]rguing that '[y]outhful immaturity is transient, while intellectual disability is not,' the State compares apples to oranges." (Appellant's Resp. at 21.) But that is exactly backwards as it is appellant who compares two fundamentally different groups.

Appellant's argument is and has been to analogize the intellectually disabled with juveniles. The en banc court of appeals did likewise. That is a flawed analogy, however, because juveniles and intellectually disabled adults are not comparable precisely because they have fundamentally different traits. Juveniles are immature but such immaturity is (generally) transient, meaning they can presumably be rehabilitated. *Cf. Hidalgo v. State*, 983 S.W.2d 746, 755 (Tex. Crim. App. 1999) (recognizing "the rehabilitative goal of the juvenile justice system.").

But that is not generally true of adults, including intellectually disabled adults. Adults (of all types) are who they are and will always be so. Or, better yet, a legislature can reasonably presume that the personalities of adults are static. Thus, it is irrelevant that appellant has the mind of an 8-year-old child (*see* Appellant's Resp. 25-26) because the mind of an *actual* 8-year-old will change over time while appellant's will not. He is spared the death penalty because of his intellectual disability, but not lifetime incapacitation.

Appellant also states that "*Miller* did not differentiate between juveniles and intellectually disabled adults." (Appellant's Resp. at 20.) True, but it did not need to because those were not the facts before it. And that is the point. Unlike appellant and the en banc court of appeals, the State does not argue that *Miller*'s holding necessarily extends to an entire category of persons that it did not address.

Moreover, by appellant's logic any traits that were not specifically discussed in *Miller*, but which are shared between children and some adults, means that *Miller*'s differentiation between juveniles and adults is irrelevant with regard to such adults. For example, adults with certain mental and emotional illnesses could be said to be less culpable than other adults. *See, e.g.*, *Modarresi*, 488 S.W.3d at 459, 466 (defendant had "post-partum depression associated with Bipolar Disorder"). Thus, under appellant's reasoning, *Miller*'s "net was [not] cast so wide as to have considered" them when it differentiated juveniles and adults. (Appellant's Resp. at 20.) But that would be an absurd reading of *Miller*. *Miller*'s point was that a legislature can presume adults—regardless of any subcategory they may fall under—have fixed traits justifying mandatory life without parole. On the other hand, juveniles, whose traits are generally transient, cannot be given such a harsh punishment without first receiving a hearing.

In case there was any doubt about whether *Miller*'s holding rested largely on the transient immaturity of youth, the Supreme Court itself made that clear by

stating that *Miller*'s "central intuition" was "that children who commit even heinous crimes are capable of change." *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016); *see also Lewis v. State*, 428 S.W.3d 860, 863 (Tex. Crim. App. 2014) ("The Supreme Court treats juveniles differently because the very fact of their youth indicates that their identities—as criminals or otherwise—are not yet finalized."). In other words, *Miller*'s holding cannot be said to extend to adults of any type, including the intellectually disabled, because it dealt with juveniles and only juveniles. Thus, appellant and the en banc court of appeals's attempt to extend *Miller* must fail.

Finally, appellant states that *Miller* "held that juveniles are categorically ineligible for the imposition of a life without parole sentence." (Appellant's Resp. at 32.) That is flatly wrong. As this Court observed, "Juveniles are still constitutionally eligible for life without parole, but *Miller* requires an individualized determination that a defendant is the rare juvenile offender whose crime reflects irreparable corruption." *Lewis*, 428 S.W.3d at 863 (quotation marks omitted). In fact, the Supreme Court recently upheld a life-without-parole sentence imposed on an offender who committed murder when a juvenile. *Jones v.*

Mississippi, 141 S. Ct. 1307 (2021).[5]

III. Appellant has shifted his argument from attacking the mandatory imposition of life without parole to imposition of that punishment in all instances.

Appellant states, "Despite the static nature of an adult's intellectual disability diagnosis, it is without cavil that many possess the capacity to cope—and *do* cope—with their environment, correct their behavior, and live productive lives." (Appellant's Resp. at 21.) He also says that "intellectually disabled adults and juveniles *both* possess the capacity to improve, or, for that matter, fail." (Appellant's Resp. at 23.)[6] No doubt. But that is not the point.

Instead, the point is that a legislature can, consistent with the Eighth Amendment, presume that adults as a class never change, and impose mandatory life without parole for heinous crimes, such as capital murder. Because his argument is really one for universal parole eligibility, he should have argued that life without parole for the intellectually disabled is unconstitutional in all instances, rather than just the mandatory imposition of it. But he has chosen to forgo that argument.

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[5] Indeed, on remand, Evan Miller himself again received life without parole. Kent Fault, *Evan Miller, Youngest Person Ever Sentenced to Life Without Parole in Alabama, Must Remain in Prison*, AL.COM (Apr. 27, 2021), https://www.al.com/news/2021/04/evan-miller-youngest-child-ever-sentenced-to-life-without-parole-in-alabama-must-remain-in-prison.html.

[6] *See also* Appellant's Resp. at 27 ("Without question, capital offenses represent the most serious types of crime in our system of justice. But this should not preclude a trier of fact from considering all mitigation and other evidence relevant to a proper punishment, as is now required with juveniles who are convicted of capital crimes.").

IV. As the non-appealing party, the State was not required to advance any particular argument below.

Appellant faults the State for failing to offer "expert testimony to counter the findings by [his] own experts, and no language from any learned treatise or opinion that analyzes this question from a scientific, or other comparatively meaningful perspective." (Appellant's Resp. at 22.) But the burden was on appellant to demonstrate the statute's unconstitutionality. *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). Thus, the State had no obligation to put on such materials.

Further, such materials are irrelevant to the issue at hand. This case is not about whether appellant is intellectually disabled. The State agrees that he is. As such, under *Atkins*, he has reduced culpability. But that spares him the death penalty, nothing else. No adult—intellectually disabled or otherwise—can automatically receive the death penalty. But, as outlined in the State's original brief, there are perfectly rational arguments for mandating life without parole for dangerous adults—such as appellant—regardless of whether they have lesser culpability.[7] And because the intellectually disabled have no more rehabilitative potential than any other adult, there is no need to analyze this issue from a scientific perspective—or any perspective other than a purely legal one.

[7] Notably, based on the nature of his crime, a drug dealer such as Ronald Harmelin is less culpable than a five-time murderer, such as appellant. Yet that did not spare Harmelin automatic life without parole.

Appellant also notes that "[t]he State did not, in its original response, raise [his] apparent failure to discuss legislative enactments, as necessary for [him] to present his constitutional challenge." (Appellant's Resp. at 28 n.9.) But the "burden of preserving error for appellate review rests on the party challenging the trial court's ruling." *Spielbauer v. State*, No. PD-0245-20, 2021 WL 1845809, at *2 (Tex. Crim. App. May 5, 2021). "Since the appellee generally is defending the trial court's ruling, he generally has no duty of preservation." *Id*. "Instead, appellate courts will uphold the trial court's ruling on any legal theory applicable to the case, even one that was not mentioned by the trial court or the appellee." *Id*. Moreover, "[a]n appellee's failure to raise an argument in the court of appeals may weigh in [this Court's] decision to grant discretionary review, but it will not foreclose [its] consideration of it once review has been granted." *Id*. Therefore, since the State is the non-appealing party, it was not required to advance any arguments below, let alone its *undisputed* argument that neither appellant nor the en banc court of appeals demonstrated a national consensus against mandatory life without parole for intellectually disabled offenders.

In fact, it is appellant who advances unpreserved arguments. His attempt, discussed above, to convert his argument against mandatory life without parole into a general attack on that sentence is improper and not before this Court. Appellant chose to cabin his argument as an attack on the lack of a punishment

hearing. He cannot now attack his sentence on the ground that it might, even after a hearing, result in his inability to receive parole.

V. Neither life nor life-without-parole sentences are functionally equivalent to the death penalty.

Appellant acknowledges that *Ex parte Maxwell*[8] and *Montgomery v. Louisiana*[9] strongly compel limiting resentencing to life with parole eligibility or life without parole. (Appellant's Resp. at 29-30.) He disagrees, however, that this Court should decide the issue in the event it affirms the court of appeals. (Appellant's Resp. at 29.) But it would be odd if appellant were eligible for a greater range of punishment than juveniles in like circumstances, especially since appellant's entire argument is predicated on equating the two classes of offenders. Thus, if this Court affirms, it should reach the issue and limit the range of punishment as it did in *Maxwell*.

Furthermore, he equates a potential "*de facto* life sentence" to the death penalty. (Appellant's Resp. at 30.) But a life sentence, whether with or without parole, is *not* the functional equivalent of the death penalty. As explained in the State's original brief, the *Harmelin* majority made clear that, when it comes to adults, there is a clear distinction between the death penalty and life without parole, let alone life with parole eligibility. *Harmelin*, 501 U.S. at 995-96.

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[8] *Ex parte Maxwell*, 424 S.W.3d 66 (Tex. Crim. App. 2014).

[9] *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

Moreover, if life and life without parole are death sentences, then the court of appeals had no jurisdiction to decide this issue. Tex. Const. art. V, § 5(b); Tex. Code Crim. Proc. art. 4.03 ("The Courts of Appeals shall have appellate jurisdiction coextensive with the limits of their respective districts in all criminal cases *except those in which the death penalty has been assessed*." (emphasis added)); *id*. art. 4.04, § 2; *id*. art. 37.071, § 2(h). That is, appellant cannot have it both ways—either he received a death sentence and the lower court could not review his claim, or he did not and this Court must reject his attempts to equate life and life-without-parole sentences with the death penalty.

VI. Appellant's aspersions against the Legislature are demonstrably wrong.

Finally, appellant argues that this Court should do the Legislature's job for it because the "current state of this state's politics practically guarantees that" he could never convince his fellow citizens to legislatively grant the relief he seeks. (Appellant's Resp. at 31.) But that is not a proper basis for upholding the court of appeals.

First, as the State pointed out in its original brief, the Supreme Court has recognized that the intellectually disabled are not without political power. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985). So, there is no reason to think that such pleas will actually fall on deaf ears. In fact, even though this Court has recognized that juveniles are still constitutionally eligible for life without parole, *Lewis*, 428 S.W.3d at 863, the Legislature has spared them that punishment even when they commit capital murder. Tex. Penal Code Ann. § 12.31(a)(1); *cf. Jones*, 141 S. Ct. at 1323 (discussing the broad range of sentencing options available to the states, but not mandating any of them). Thus, there is no reason to think that the Legislature cannot be persuaded to change the capital-sentencing scheme for intellectually disabled offenders as well, meaning

appellant's broadside against the people's representatives is unfounded.[10]

Second, the Legislature may ultimately disagree with appellant and keep the law as it is. But that is its prerogative. And our state constitution forbids this Court from acting in its stead to "correct" its "mistake," Tex. Const. art. II, § 1, particularly in the face of binding Supreme Court precedent and a complete lack of national consensus supporting appellant's position.

* * *

The State takes other issues with appellant's response but will not belabor this Court with every particular. Instead, it re-urges the arguments from its original brief with the additional comments above.

[10] Indeed, in Michigan, though the statute Harmelin was sentenced under was upheld by the Supreme Court, the state legislature changed the law and allowed parole for such offenders. Brian M. Thomas, Criminal Procedure—Parole Eligibility—Michigan Eliminates Mandatory Drug Sentences and Allows Parole for Possession of 650 or More Grams of Cocaine or Heroin. 1998 Pub. Act 314 (To Be Codified At Mich. Comp. Laws Ann. §§ 791.234 & .236), 76 U. Det. Mercy L. Rev. 679 (1999). In other words, even though the courts decided that the statute was constitutional, the legislature was persuaded to extend greater relief than the Constitution required. There is no reason why the Texas Legislature might not be persuaded likewise.

PRAYER

Counsel for the State prays that this Honorable Court REVERSE the court of appeals, and AFFIRM the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Andrew N. Warthen, hereby certify that the total number of words in this brief is 3,065. I also certify that a true and correct copy of this brief was emailed to appellant Johnny Joe Avalos's attorney, Jorge G. Aristotelidis, at jgaristo67@gmail.com, and Stacey Soule, State Prosecuting Attorney, at information@spa.texas.gov, on this the 23rd day of June, 2021.

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